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No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Is the use tax which Minn. Stat. § 297A.14 imposes on paper and ink consumed in publishing newspapers a "tax on knowledge" prohibited by the First and Fourteenth Amendments?

2. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, with the result that 97 percent of Minnesota's publishers pay no use tax while appellant alone pays two-thirds of the use taxes collected, does Minn. Stat. § 297A.14 violate the First and Fourteenth Amendments by discriminatorily restricting the speech of large publishers and enhancing the relative voice of small publishers?

3. By exempting from taxation the first $100,000 of paper and ink consumed annually by each publication, does Minn. Stat. § 297A.14 deny equal protection of the laws and violate the Fourteenth Amendment by effectively imposing a graduated tax on the volume of a publisher's business activity?

4a. Where Minnesota specifically exempts newspapers from sales tax, do the First and Fourteenth Amendments prohibit Minnesota from imposing a special "compensating use tax" under Minn. Stat. § 297A.14 upon the paper and ink consumed by newspapers, in an attempt to avoid the constitutional problems which would be presented by a direct tax on the sale of newspapers?

b. Assuming that a direct tax on the sale of newspapers would be constitutional, do the First and Fourteenth Amendments nevertheless prohibit Minnesota from imposing sales and use taxes which discriminate between large and small newspapers, between domestic and foreign newspaper publishers, between newspaper publishers and other industrial users of paper and ink, and between newspapers and other entities exempt from sales tax, when such discriminatory tax treatment is not necessary to accomplish any compelling state interest?

LIST OF PARTIES

In addition to the parties contained in the caption of this case in this Court, the Minnesota Civil Liberties Union appeared as *amicus curiae* in support of appellant before the Minnesota Supreme Court.

NOTE AS TO ABBREVIATIONS

Throughout this Brief, appellant will use these abbreviations:

"A —" refers to pages in the Appendix to Jurisdictional Statement.

"JA —" refers to pages in the Joint Appendix.

"Motion at —" refers to pages in the Appellee's Motion to Dismiss.

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ON APPEAL FROM THE MINNESOTA SUPREME COURT

BRIEF OF APPELLANT

OPINIONS BELOW

The Minneapolis Star and Tribune Company ("Star Tribune")[1] appeals from a January 5, 1982, judgment of the Minnesota Supreme Court upholding the constitutionality of Minn. Stat. § 297A.14, which taxes newspapers' consumption of paper and ink in excess of $100,000 per year. The challenged use tax affects only a few publishers of Minnesota's largest daily newspapers; 97 percent of the state's publishers pay no such tax.

[1] Appellant has no parent company. Except for Information Publishers, Inc., a Minnesota corporation, all of its subsidiaries are wholly owned subsidiaries. Appellant is affiliated with the Des Moines Register and Tribune Company by common individual shareholders and by the ownership by the Des Moines Register and Tribune Company of 13% of appellant's outstanding stock. Effective June 1, 1982, the name of Minneapolis Star and Tribune Company was changed to Cowles Media Company. In the interests of clarity and consistency, appellant's prior name will be used throughout this Brief.

The Minnesota Supreme Court's opinion (A-19) is published at 314 N.W.2d 201 and at 7 Media L. Rep. 2579. The opinion of the Hennepin County District Court invalidating the challenged use tax (A-49-66) has not been reported.

GROUNDS OF JURISDICTION

Star Tribune commenced this tax refund action in the Minnesota State courts, specifically challenging the validity of Minn. Stat. §§ 297A.14 and 297A.25 on the grounds that these state statutes are repugnant to the freedom of press and equal protection clauses of the First and Fourteenth Amendments to the United States Constitution. The Minnesota Supreme Court upheld the challenged statutes, reversing a judgment of the Hennepin County District Court which had held the challenged statutes invalid on all grounds asserted.

This Court has jurisdiction by appeal pursuant to 28 U.S.C. § 1257(a). The judgment of the Minnesota Supreme Court was entered on January 5, 1982. (A-66.) Notice of appeal to this Court was duly served on all parties on March 10, 1982, and timely filed in the Minnesota Supreme Court on March 12, 1982. (A-68.) See 28 U.S.C. § 2101(c). This Court noted probable jurisdiction on June 21, 1982. 50 U.S.L.W. 3998.01 (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment, United States Constitution:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Section One, Fourteenth Amendment, United States Constitution:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes:

The full text of the relevant Minnesota statutes is set forth in the Appendix (A-70-90). The statutory provision most directly at issue in this appeal is the following paragraph of Minn. Stat. § 297A.14 (1974):

"Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in Section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section." (A-84.)

STATEMENT OF THE CASE

This appeal involves Star Tribune's claim for a refund of $874,265.04 of use taxes which it paid to Minnesota on paper and ink consumed in producing its newspapers from January 1, 1974, through May 31, 1975. A refund claim was filed with the Sales and Use Tax Division of the Minnesota Department of Revenue on August 5, 1975 (JA-16), and was denied the next day (JA-20). Star Tribune commenced this tax-refund action on August 27, 1975, pursuant to Minn. Stat. § 297A.35 (JA-2).

During 1974 and 1975, Star Tribune published the morning *Minneapolis Tribune* six days a week and on Sunday, and the evening *The Minneapolis Star* six days a week. Both newspapers are "publications" as defined in Minn. Stat. § 297A.25, subd. 1(i), and are Minnesota's two largest-circulation paid-subscription daily newspapers.

History of the Challenged Use Tax

In 1967, Minnesota for the first time imposed a tax on the sale of tangible personal property. (1967 Minn. Laws, 1st Sp. Sess., Ch. 32.) The tax rate began at 3 percent, rose to 4 percent in 1971 (A-74) and to 5 percent in 1981 (A-2, n.1).

Section 14 of the 1967 Act (Minn. Stat. § 297A.14) established a use tax payable on "the privilege of using, storing or consuming in Minnesota tangible personal property," unless the sales tax had been paid on such property. Minnesota explicitly characterizes its use tax as "a compensating or complementary tax." 13 Minn. Code of Agency Rules, Tax S & U 300 (1979).

The 1967 Sales and Use Tax Act specifically and totally exempted, *first*, the sale of publications and the sale of materials used to produce publications, Minn. Stat. § 297A.25, subd. 1 (i); and *second*, the sale of materials used or consumed in the industrial production of personal property intended ultimately to be sold at retail, Minn. Stat. § 297A.25, subd. 1(h). For convenience, Star Tribune will refer to these two exemptions as the "publications exemption" and the "industrial user exemption."

Effective November 1, 1971, the publications exemption was amended to exclude from the exemption paper and ink consumed in producing publications; publications themselves remained tax-exempt. (A-77.) Minnesota thereby imposed a use tax on all such paper and ink. The 1971 Legislature did not change the exemption for industrial users, whose consumption of paper, ink and other products continued to be exempt from any use tax regardless of whether sales of their end products were subject to, or exempt from, the sales tax. "Pub-

lications" was the *only* previously exempt sales and use tax category adversely affected by the 1971 legislation.[2]

Effective January 1, 1974, the publications exemption was again amended so as to impose the use tax on consumption of paper and ink by publications only to the extent that the cost of those products consumed in any calendar year exceeded $100,000 per publication. (A-84.) As a consequence, 97 percent of Minnesota newspaper publishers pay no use tax; only publishers of large Minnesota newspapers—who consume more paper and ink because they publish more pages, more often, to more people—pay any use tax on their consumption of paper and ink.

Effect of the Challenged Use Tax

Extending the use tax in 1971 to paper and ink consumed by newspapers did not generate significant revenue when compared with that year's real revenue-raising measure—raising the tax rate from 3 to 4 percent. In 1974, one of the tax years here in question, the State's sales and use tax revenues totalled $370,116,066 at a 4 percent rate. *See* Minnesota Sales and Use Tax Annual Report 1974 (reproduced in part as Appendix C to Star Tribune's Memorandum in Support of Motion for Summary Judgment). At a 3 percent tax rate, total 1974 revenues would have been $277,587,649. Thus, the tax rate increase pro-

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[2] The 1971 sales and use tax legislation (A-74-81) changed the exemptions from sales and use taxes (Minn. Stat. § 297A.25) only by *eliminating* the exemption previously granted to paper and ink consumed in producing publications (section (i)), by *expanding* the exemption for sales to government bodies (section (j)) and by *modifying*, without materially affecting the scope of, certain exemptions granted to taconite companies, telephone companies, railroads, freight line companies, sleeping car companies, and express companies which were taxed on another basis in lieu of sales and use taxes (sections (l), (m), (n) and (o)).

duced an additional $92,529,016 for the State in 1974. In contrast, the challenged use tax on paper and ink produced only $893,355 for the State in 1974 (A-5, n.4), less than 1 percent of the revenue from increasing the sales tax rate, and less than 1/4 of 1 percent of total sales and use tax revenues that year.

The challenged use tax contributed relatively little to the State's total receipts of $3.67 billion for the fiscal year ending June 30, 1975. *See* Budget Message of Governor Rudy Perpich to the 70th Session of the Minnesota State Legislature (January 25, 1977). Revenues from the challenged use tax were barely noticeable even as a percentage of the State's budget *surpluses* of $224 million for fiscal year 1973-74 and of $403 million for fiscal year 1974-75. *See State has $224 million budget surplus,* Minneapolis Tribune, August 23, 1974, at A1; *State ends fiscal year with expected surplus,* Minneapolis Tribune, September 13, 1975, at B7.

Although the challenged use tax made at most a trifling contribution to the State's coffers, it had a dramatic effect upon a few of the taxpaying newspaper publishers, particularly Star Tribune. In 1974, Star Tribune alone paid $608,634 in use taxes on paper and ink. (A-5, n.4.) Its 1974 corporate income taxes, payable on net income and therefore reflecting its relative profitability, totalled only $1,000,000; it paid the State real estate taxes of only $355,000. (JA-12.) These figures demonstrate that the "sting" of the challenged use tax is, intentionally or unintentionally, substantial.

Only a few Minnesota newspaper publishers felt the sting of the tax after 1973, due to the $100,000 exemption. During 1974 and 1975, approximately 400 paid-circulation newspapers were published in Minnesota. Approximately 90 percent had publication schedules of twice a week or less; none of these newspapers consumed $100,000 of paper and ink in either

year, and thus none paid any use tax on its consumption of paper and ink. In each year, 29 daily newspapers were published in Minnesota, six in the three largest metropolitan areas (Minneapolis, St. Paul, and Duluth). In 1974, only 11 publishers of those daily newspapers paid a use tax on paper and ink; in 1975, only 13 did so. In both years, Star Tribune paid nearly two-thirds of all use taxes collected from Minnesota newspapers.[3]

Thus, during 1974 and 1975, the use tax in question was imposed upon only 3 percent of all Minnesota newspaper publishers. During those years, no daily newspaper with a circulation of less than 12,500 paid any use tax, while all but one daily newspaper with a circulation greater than 12,500 paid some use tax in one year or the other. Among those paying any tax, the amounts of use tax paid in 1974 varied widely, from $608,634 paid by Star Tribune to $120 paid by the *Fergus Falls Daily Journal*. (A-5-6, nn. 4, 5.)

Proceedings Below

On May 30, 1980, Hennepin County District Judge Donald T. Barbeau granted Star Tribune's motion for summary judgment, holding the challenged tax unconstitutional as an abridgement of freedom of the press and as a denial of equal protection under both the United States and the Minnesota constitutions. He concluded:

> The challenged use tax is not . . . a tax of general application. It is a limited, special tax, in its effect in the

[3] During calendar year 1974, Star Tribune paid $608,634 of the $893,355 in total taxes collected, or 68 percent. (A-5, n.4.) During calendar year 1975, Star Tribune paid $636,113 of the $944,055 in total taxes collected, or 67 percent. (A-6, n.5.)

nature of a license tax, which abridges the freedom of the press in four ways:

First, it taxes a select group of Minnesota publishers, leaving other Minnesota publishers free of its burden. This effect results from the $100,000 exemption.

Second, it is specifically and exclusively directed at publications in general; no other industrial users of paper and ink products are subject to this use tax.

Third, its direct tendency, if the tax is to be avoided, is to restrict circulation and thereby reduce the dissemination of information to the general public.

Fourth, it is the practical and legal equivalent of a direct tax on the exercise of a First Amendment right because of its special and limited impact. (A-65-66.)

The State appealed, and the Minnesota Supreme Court reversed. (A-1-19.) That court characterized the tax as an ordinary form of taxation for the support of government, whose classifications were justified by the compelling government purpose of revenue-raising. It stated:

The history and setting of section 297A.14 . . . reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean* [*v. American Press Co.*, 297 U.S. 233 (1936)], sales and use taxes are now commonplace and readily accepted. (A-12.)

The Minnesota Supreme Court justified the discriminatory use tax classification between newspaper publishers and non-publishers on the ground that most goods produced by non-publishers are subject to retail sales tax, whereas newspapers are statutorily exempt from any retail sales tax. The court speculated that this arrangement "may be a result of the difficulties and expense of collecting sales tax upon sales of such low-priced items [publications]." (A-13.)

Having concluded that the use tax on publications' consumption of paper and ink "is constitutionally justified . . . as a revenue-raising measure," the court held that the "$100,000 exemption itself is justified if it is an integral part of the sales and use tax system." (A-17.)

SUMMARY OF ARGUMENT

This appeal concerns the constitutionally permissible nature and extent of taxation upon the expressive activity of newspapers. Within its general sales and use tax laws, the State of Minnesota has created a special tax paid only by Minnesota publishers of large daily newspapers. The result abridges freedom of the press and denies equal protection of the laws, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Minnesota's method of abridging press freedom can trace its origins back more than 250 years, but the "tradition" is far from noble. Most States have been extremely wary of enacting such discriminatory and censorial taxes on newspapers' expressive activity. The challenged use tax on paper and ink is, in all its peculiarities, unique; no other State imposes this precise tax, although Iowa has a similar tax on paper and ink without the $100,000 per-publication exemption

feature. *See* Iowa Code §§ 422.42, 423.1 (1981). Most States have chosen to exempt newspapers from their sales and use taxes. Whether because of doubts as to the constitutionality of a sales tax on newspapers, because of recognition of the important public policy of encouraging the circulation of information, because of public distaste for a sales tax on newspapers[4] or because of the political effectiveness of a united press, only 16 States impose even a limited sales or use tax upon any aspect of newspaper publishing, be it advertising, circulation, or consumption of newsprint. Presstime, December 1981 at 16.

This longstanding State sensitivity to First Amendment values is pressured constantly by revenue needs (particularly in troubled economic periods) and by public and/or legislative irritation at certain elements in the press. Minnesota's use tax reflects a subtle and dangerous effort to neutralize normal political opposition to a new tax on the press. Imposing a use tax on paper and ink rather than a sales tax on newspapers partially disguises the impact of the tax and mutes adverse

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[4] The following colloquy occurred at oral argument before the Minnesota Supreme Court (A-34-35):

> "Justice Otis: What's the apparent reason for exempting newspapers from that [sales tax]?
>
> "Mr. Kempainen: Many reasons can come into effect, Your Honor. First of all, this is the United States of America, we have a long history in this country of respecting the freedom of the press, and just on that ground alone and the political unpopularity of imposing a sales tax upon the sale of an actual newspaper would be ground enough, we believe, for any State Legislature to exempt that sales tax. There are other grounds which I have mentioned in my brief. . . . Perhaps the Legislature just sought to encourage the dissemination of news. . . ."

reaction by the reading public.[5] The $100,000 exemption removes any use tax burden from most Minnesota publishers, including the small and rural newspapers which often have significant influence upon individual legislators. Unless the Minnesota use tax is invalidated, other States may be tempted to follow Minnesota's example, thereby spreading this discriminatory burden on the publishers of large newspapers.

J. Edward Gerald, professor of journalism and mass communications at the University of Minnesota, anticipated this sort of discrimination more than three decades ago. Speaking from his experience as manager of the Missouri Press Association, he warned:

> If the metropolitan newspapers, whose size and resources make them especially annoying to legislative leaders during periods of controversy, could be separated under the Constitution from their smaller but more numerous country cousins, they would be at the mercy of legislators who feel either thwarted or persecuted by the newspapers; and any action taken would probably spring not from statesmanship but from human irritation.

J. Gerald, *The Press and the Constitution* 103 (1948); *see also* J. Gerald, *The British Press Under Government Economic Controls* 206 (1956) (same effect noted in England). During its most recent Term, in another case rooted in Minnesota legisla-

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[5] This factor was noted during oral argument before the Minnesota Supreme Court (A-35):

> "Justice Otis: But the Legislature didn't seem inhibited when it came to income taxes and property taxes.
>
> "Mr. Kempainen: That's correct, Your Honor, perhaps because the sales tax is imposed more directly upon the actual consumer as he buys his newspaper. You would actually have to fork over the tax at the same time that he buys the newspaper, whereas the property tax and the income tax and any other form of taxation is more indirect. . . ."

tion, this Court reaffirmed the broad principle stated by Justice Jackson: "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Larson v. Valente*, 50 U.S.L.W. 4411, 4416 (1982), *quoting Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Because the challenged use tax inhibits press activity clearly protected by the First Amendment, its classification scheme must be subjected to strict and exacting scrutiny. The Minnesota Supreme Court correctly identified the applicable standard of review, but misapplied it. That court did not address the essential issue of whether the discriminatory classifications of the challenged use tax were necessary to accomplish what it characterized as the "compelling government purpose of revenue-raising." (A-1.) In its Introduction, Star Tribune will address this analytical failure of the Minnesota Supreme Court.

In Part I of this Brief, Star Tribune will argue that the challenged use tax imposed only on paper and ink consumed by newspapers is invalid on its face because it takes one of the three classic forms of the odious "taxes on knowledge"—a tax on paper. Because of the history, necessary effect and potential for abuse of such taxes, proof of specific punitive or censorial legislative intent is unnecessary in order to declare the challenged use tax unconstitutional as an abridgement of freedom of the press.

By exempting the first $100,000 of paper and ink consumed by each publication annually, the 1973 amendment to the challenged use tax freed 97 percent of the State's publishers from any use tax burden whatsoever, and subjected publishers of

large newspapers to a steeply graduated effective rate of tax. Parts II and III of this Brief will argue that the challenged use tax unconstitutionally discriminates against the expressive activities of publishers of large newspapers thereby abridging freedom of the press, and imposes a graduated tax on the business activity of these publishers which bears no relation to a given taxpayer's profitability, thereby denying equal protection of the laws.

Part IV of this Brief will challenge two central assumptions critical to the Minnesota Supreme Court's decision: first, that a tax imposed directly on the sale of newspapers would withstand constitutional scrutiny, and second, that the burden which the challenged use tax imposes on the publishers of large Minnesota newspapers (in the absence of a tax on the sale of newspapers) corresponds to that which a sales tax would impose. This Court need not address the issue of the constitutionality of a sales tax on newspapers (which Minnesota has *not* imposed) in order to invalidate the challenged use tax on paper and ink (which Minnesota imposes only on publishers of large newspapers). However, because of the Minnesota Supreme Court's approach to upholding the challenged use tax, Part IV-A of this Brief will argue that such a sales tax would fall directly upon a newspaper's expressive activity and therefore would abridge freedom of the press. Part IV-B will assume, *arguendo*, that a tax on the sale of newspapers would be constitutional, but will argue that the challenged use tax so distorts normal sales and use tax principles that it unconstitutionally discriminates against, and among, newspaper publishers.

ARGUMENT

Introduction: The Minnesota Supreme Court Misapplied the Constitutional Standard of Strict and Exacting Scrutiny.

The Minnesota Supreme Court approached each of Star Tribune's objections to the challenged use tax with a skewed understanding of the appropriate legal standard of review, and repeatedly deferred to a perceived legislative discretion despite the tax's impact on First Amendment rights.[6] It gave no more than lip service to the appropriate standard of constitutional review.

Taxation and regulation which infringe First Amendment rights are subject to strict and exacting judicial scrutiny. *Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4073 (1981) ("regulation of First Amendment rights is *always* subject to exacting judicial scrutiny") (emphasis added); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 99, 101 & n.8 (1972); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). The State may justify limitations on First Amendment rights or discriminatory classifications under this standard only by showing that they are necessary or essential to accomplish a compelling state interest. *United States v. Lee*, 50 U.S.L.W. 4201, 4203 (1982); *Police Department of City of Chicago v. Mosley, supra* at 99; *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

The challenged use tax obviously interferes with First Amendment rights. The communication of ideas lies at the

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[6] First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *NAACP v. Claiborne Hardware Co.*, 50 U.S.L.W. 5122, 5128 n.43 (1982); *Grosjean v. American Press Co.*, 297 U.S. 233, 243-44 (1936).

very core of First Amendment activity. Newspaper publishers can increase the flow of information to the public by publishing more pages, by increasing the frequency of publication or by increasing circulation. Each of these activities is protected by the First Amendment.[7] Each requires increased consumption of paper and ink. By taxing the consumption of paper and ink, and by increasing the effective rate of tax as such consumption increases (A-90-92), the State directly interferes with First Amendment activity.

At oral argument before the Minnesota Supreme Court, counsel for the State conceded that "it would be very difficult to uphold this particular statute under the strict scrutiny standard of review." (A-29, 34.) Understandably, then, the State contended and continues to contend that the challenged use tax should not be subject to strict scrutiny at all because it is "a part of Minnesota's general system of nondiscriminatory sales and use taxation," and thus does not "impermissibly interfere" with newspapers' fundamental constitutional rights. (A-28-30; Motion at 16, 17.) The State might argue with equal logic that statutes forbidding publication of the names of rape victims disclosed in public records, or of juvenile offenders, are exempt from close judicial review as "part of a general criminal code" or that libel laws are similarly immune from constitutional analysis as "part of the State's general system of tort law." This Court consistently has shown itself to be more sensitive to such constitutional questions. *See,*

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[7] The Minnesota Supreme Court appears to have assumed that only increasing circulation was protected activity. (A-15-16.) That assumption is mistaken. For example, in *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974), this Court held that the First Amendment prohibited governmental regulation of editorial decisions on the *size* as well as the content of a newspaper.

e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (names of rape victims); *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (names of juvenile offenders); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel).

The Minnesota Supreme Court rejected the State's argument on this point and recognized its duty to subject the challenged use tax to strict and exacting scrutiny. (A-8, 12.) However, it misapplied the test. It was all too deferential to the State's claim that the challenged use tax had no censorial purpose, and was simply a revenue-raising measure. (A-12.) Although the record contains no evidence of direct statements of punitive intent by the responsible legislators,[8] close analysis of the history and effect of the challenged use tax casts serious doubt upon the suggested "compelling government purpose of revenue-raising" (A-1) as the true purpose of the legislation. See pp. 4-7 above.

The Minnesota Supreme Court simply failed to apply the full test of strict and exacting scrutiny. It never addressed the question of whether the discriminatory classifications of the challenged use tax were necessary to further the general purpose of raising revenue. Rather, the Minnesota Supreme Court concluded its "strict scrutiny" analysis with the general observation: "There is no reason to believe that this legislative choice [of a use tax on paper and ink rather than a sales tax on newspapers] is insufficiently tailored to achieve the goal

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[8] Star Tribune's Complaint does allege: "In actual fact, by virtue of the size of the exemption, the tax involved herein was intended by the Legislature to be paid by only a small number of the largest newspapers in the State of Minnesota, and the $100,000 exemption figure accomplished just such a result." (JA-6.) Star Tribune does not agree with the State's suggestions that the legislative motives were pure and benign (see Motion at 6, 8, 10-11).

of raising revenue." (A-13.) That approach is a far cry from this Court's standard, which places a burden on the State to prove that the challenged use tax is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court*, 50 U.S.L.W. 4759, 4762 & n.17 (1982).

The Minnesota Supreme Court's uncritical deference to broad legislative discretion to raise revenue as it sees fit would shield almost any tax on the press from successful judicial challenge, for all taxes raise some revenue, even though revenue-raising may not necessarily be the primary purpose or effect of every tax. Properly applied, strict and exacting scrutiny requires a close examination of the details, as well as the general thrust, of the challenged scheme of regulation or taxation. States may not raise revenue in ways which unduly infringe upon First Amendment activities. The State failed to meet its burden of establishing that each aspect of the challenged use tax was necessary to accomplish a compelling state interest, and so the tax cannot be upheld under the constitutional standard which the Minnesota Supreme Court purported to apply.

I. The Challenged Use Tax Abridges Freedom of the Press by Imposing a Classic "Tax on Knowledge" in Violation of *Grosjean v. American Press Co.*

The form and impact of the Minnesota use tax here at issue are strikingly similar to those of the Louisiana license tax which this Court invalidated in *Grosjean v. American Press Company*, 297 U.S. 233 (1936). In *Grosjean*, 13 newspapers were subject to a 2 percent license tax on gross receipts derived from advertising, while at least 124 Louisiana news-

papers paid no such tax, because the tax applied only if a newspaper's weekly circulation exceeded 20,000. *Id.* at 241. In the present appeal, approximately 3 percent of all newspaper publishers in Minnesota paid the challenged use tax in annual amounts varying from $120 to $636,113, while the remaining 97 percent, with circulations of 12,500 per day or less, paid no use tax. (A-4-7.) Here, as in *Grosjean*, small rural publishers pay no tax, while large metropolitan publishers shoulder virtually the entire tax burden.

In *Grosjean*, this Court invalidated the tax there at issue as an unconstitutional abridgement of freedom of the press. Its form demonstrated the Louisiana license tax to be a successor to the English and early American efforts to censor or control the press by taxation. 297 U.S. at 245-51. The history of these "taxes on knowledge" is recounted in the *Grosjean* opinion, as well as in such works as C. Collet, *History of the Taxes on Knowledge* (1899); C. Duniway, *The Development of Freedom of the Press in Massachusetts* 119-20, 133-37 (1906); 2 T. May, *Constitutional History of England* 107-08, 172, 213-15 (1891); F. Siebert, *Freedom of the Press in England 1476-1776* 306-22 (1952). *See also* Appellee's Brief at 48-70, *Grosjean*.

These sources describe the three principal forms of the taxes on knowledge:

> (1) A tax on newspapers and pamphlets, at a flat rate per copy, and collected by means of a stamp. The amount of tax varied with the number of pages in the publication; in some cases, the early English stamp tax nearly doubled the price of the newspaper. 1 Collet, *supra* at 18.
>
> (2) A tax on advertisements appearing in newspapers published at specified frequencies (originally weekly or more frequently), at a fixed amount per advertisement.

(3) Taxes on paper, at a fixed amount per ream. The amount of tax varied depending upon whether the paper was imported or domestic, and depending upon the quality of the paper.[9]

These sources also chronicle the intense popular opposition to all such taxes on the ground that they impaired the dissemination of information.

Resistance to these censorial taxes played a substantial role in the adoption of the First Amendment. One of the most telling criticisms of the proposed Constitution was the lack of a formal bill of rights, and ratification of the Constitution in several key states was made contingent upon an agreement to add such a bill as soon as the new government got underway. C. Stevens, *Sources of the Constitution of the United States* 213 (1927). Therefore, the Anti-Federalist writings, rather than the Federalist writings, are "the more influential" on the bill of rights issue. 1 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* 527 (1971).

Federalists recognized the necessity of a free press, but argued that the federal government was given no express power over the press and therefore a declaration of press freedom was unnecessary. *See, e.g.*, 1 Schwartz, *supra* at 439, 454, 529. In response, Anti-Federalists were quick to point to Congress's powers of taxation as a specific potential threat to a free press. *Id.* at 474, 576; L. Levy (ed.), *Freedom of the*

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[9] In addition, the Stamp Act of 1712 (10 Anne, c.19) imposed taxes on imported linen and soap. 1 Collet, *supra* at 8. By the State's apparent reasoning, this would render the Stamp Act "general legislation," immune from constitutional attack. That result of course is untenable and merely emphasizes the weakness of the State's position, because the First Amendment in large part sprang from the Framers' vehement opposition to the Stamp Act. *Grosjean v. American Press Co.*, 297 U.S. at 248-49.

Press from Zenger to Jefferson 143-44 (1966); J. McMaster & F. Stone (eds.), *Pennsylvania and the Federal Constitution 1787-1788* 181 (1888); *cf. id.* at 570-71, 580-81.[10]

The Framers even witnessed a demonstration of how constitutional guarantees of freedom of the press could be used to obtain repeal of objectionable taxes on newspapers. In 1780, Massachusetts had adopted a constitution which included a declaration in favor of an unrestricted, but undefined, freedom of the press. Duniway, *supra* at 133-136. "The first public debate about the practical significance of the new constitutional guarantee arose in 1785, over a state law of that year imposing a stamp tax on all newspapers and almanacs." *Id.* at 136. Although the tax appeared to be purely a revenue measure, it was denounced as an unconstitutional limitation on freedom of the press and was repealed in 1786; an advertisement tax levied to replace the income lost from repeal of the stamp tax likewise was attacked as an unconstitutional hindrance to free development of the press, and was repealed in 1788. *Id.* at 136-37. At least one Anti-Federalist alluded to the Massachusetts situation in the course of his arguments for a bill of rights. McMaster & Stone, *supra* at 181.

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[10] Alexander Hamilton alone among Federalists or Anti-Federalists appears to have argued that taxes on newspapers would not abridge liberty of the press: "We know that newspapers are taxed in Great Britain, and yet it is notorious that the press no where enjoys greater liberty than in that country." 1 Schwartz, *supra* at 582 n.1. Hamilton's statement is "wholly unconvincing," Levy, *supra* at 144; Collet and the other sources cited at p. 18 above provide ample refutation of the claim that the English taxes had no ill effect on freedom of the press. The American intention was to reject the taxes which were imposed upon the English press. The Framers of the First Amendment were familiar with the English struggle to repeal the obnoxious taxes and with the "general adverse sentiment of the colonies" concerning those taxes. *Grosjean v. American Press Co.*, 297 U.S. at 248. In short, Hamilton lost this argument.

In light of history, this Court unanimously concluded in *Grosjean* that the First Amendment was intended to, and did, prevent government from restraining freedom of the press through the "taxes on knowledge" previously utilized in England and in some of the colonies. 297 U.S. at 248-49. This Court recognized that the very form of the taxes on knowledge renders them unconstitutional. 297 U.S. at 250.

The Louisiana tax in *Grosjean* combined the first two classic forms of taxes on knowledge. It directly taxed advertisements, and it indirectly taxed the circulation of newspapers by tying the applicability of the advertisement tax to a certain level of circulation. Minn. Stat. § 297A.14 embodies the third classic form of taxes on knowledge—a tax on paper. Historically, a tax on paper was no less objectionable than a newspaper stamp tax or a tax on newspaper advertising.[11] The Minnesota tax also penalizes increased circulation because it applies only when consumption of paper and ink, and hence circulation, exceed a certain level.

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[11] 2 May, *supra* at 215 ("Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'taxes on knowledge,' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of the newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments.") (footnote omitted). *See also Taxes on Knowledge*, Edinburgh Review, October, 1835, at 126-32. For a more recent analysis of the central importance of paper to newspaper publishing, *see generally* J. Gerald, *The British Press Under Economic Controls* (1956).

The Minnesota Supreme Court attempted to distinguish *Grosjean* by referring to the history and setting of the Louisiana gross receipts tax on newspaper advertising revenues, namely that the tax apparently had been enacted to penalize large newspapers that were political opponents of Governor Huey Long. (A-9-10.) However, *Grosjean* contains only a single veiled reference to the "present setting" of the Louisiana tax, 297 U.S. at 250; the primary reason for invalidating the tax was the lengthy history and potential of abuse of such taxes in general, and not the specific punitive intent of the particular Louisiana tax in question. *See also City of Tampa v. Tampa Times*, 153 Fla. 709, 15 So.2d 612, 613 (1943).

Subsequent decisions of this Court have confirmed that the basis of *Grosjean* was the tax's necessary effect and potential for abuse, and not the presence of a punitive legislative intent. In *Lovell v. Griffin*, 303 U.S. 444, 452 (1938), this Court noted that "the license tax in *Grosjean v. American Press Co.* . . . was held invalid because of its direct tendency to restrict circulation." In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court stated that *Grosjean* stands,

> not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in Grosjean the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose just such a tax.

Id. at 384-85. And in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court unanimously stated:

> In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action . . . Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived *to have the consequence* of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *Grosjean v. American Press Co.*

Id. at 461-62 (emphasis added).

Such readings of *Grosjean* are consistent with decisions of this Court in other contexts holding that proof of specific punitive intent is not a prerequisite to invalidating legislation which deters the exercise of First Amendment rights. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 65 (1976); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963). This emphasis upon the *effect* of legislation is vitally important, because specific legislative intent may be ambiguous or impossible to prove in such cases. T. Emerson, *The System of Freedom of Expression*, 413-14 (1970).

If a tax takes the form of one of the three classic "taxes on knowledge," efforts to justify the tax purely as a "revenue-raising measure" are both suspect and insufficient. The earliest efforts to control the press through taxation used the guise of raising revenue. Proponents of the Stamp Act of 1712 touted it as a way to keep newspapers in hand and at the same time to help raise the large supplies of money necessary for Queen Anne to fight the War of the Spanish Succession. Stewart, *John Lennox and The Greenock Newsclout: A Fight Against the Taxes on Knowledge*, 15 Scottish Historical Rev. 322, 326-27 (1918); J.B. Williams, *History of*

English Journalism (1908), *quoted in Grosjean v. American Press Co.*, Appellee's Brief at 49-50; Siebert, *supra* at 309. The English government subsequently opposed efforts to repeal those taxes because of the revenue loss which repeal would cause. *See, e.g.*, 1 Collet, *supra* at 167-68; 2 *id.* at 67, 73, 96-97, 119-34. Professor Gerald noted that the newspaper stamp duty and the special tax on advertising in England "were a part of ordinary revenue measures; the position of the government was that the press, as a business, should pay its fair share of taxes." J. Gerald, *The British Press Under Government Economic Controls* 6 (1956). Whatever their intent, the English taxes on knowledge retarded the establishment of mass-circulation newspapers. *Id.* at 5-6; Stewart, *supra* at 326.

In America, the First Amendment was adopted to protect the press against the taxes on knowledge, despite the revenue which such taxes raised. *Grosjean v. American Press Co.*, 297 U.S. at 249. The tax which this Court invalidated in *Grosjean* had been described by its sponsors as a measure to make newspapers pay a "license to do business like everybody else does." *See* Transcript of Record at 47, *Grosjean*. As this Court has noted, "taxes on circulation solely for the purpose of revenue were successfully resisted, prior to the adoption of the First Amendment, as interferences with freedom of the press. Surely all this was familiar knowledge to the framers of the Bill of Rights." *Jones v. City of Opelika*, 316 U.S. 584, 616-17 (1942) (Murphy, J., dissenting), *adopted as a majority opinion*, 319 U.S. 103 (1943).

It does not matter whether the tax was enacted solely to raise revenue or whether the revenue-raising was a mere pretense to disguise an intent to punish, control or restrain the press. Through the First Amendment, America has rejected

the "taxes on knowledge," on the grounds that they unacceptably and significantly interfere with the dissemination of information to which the public, as the true sovereigns of the nation and its several States, are entitled. A tax on paper and ink consumed in publishing newspapers is, by its very nature and by its historical roots, an unconstitutional tax on knowledge.

II. The Challenged Use Tax Restricts the Speech of Large Publishers and Conflicts With *Buckley v. Valeo* and Similar Decisions of This Court.

The challenged use tax applies only when annual per-publication consumption of paper and ink exceeds $100,000. The size of the exemption relieves publishers of small newspapers from most or all of the tax, while subjecting a few publishers of large daily newspapers to substantial tax liability. Apart from an opaque reference to the need for "economically sound taxes" (A-17), the Minnesota Supreme Court suggested no justification for the discriminatory classifications of large and small newspaper publishers. It alluded to, but did not specifically endorse, the State's suggestion that the $100,000 exemption "may be justified as a legislative policy to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered)." (A-17.) *Mabee* is readily distinguishable because the particular provision of the Federal Fair Labor Standards Act there involved "was inserted to put those papers [small weeklies and semi-weeklies] more on a parity with other small town enterprises." 327 U.S. at 184. In contrast, Minnesota's general sales and use taxes contain no such broad "small enterprise" exemption.

The purpose of the challenged use tax can be no broader than its actual effect: it favors publishers of small newspapers and penalizes publishers of large newspapers. In the present context, either effect is unconstitutional. The First Amendment not only prevents the State from burdening the entire press with a tax not borne by other businesses, it also bars the State from singling out particular segments of the press for special favors or penalties relating to expressive activity.[12] If such favoritism is the purpose of the $100,000 exemption (as the State itself suggests, Motion at 25-27), that purpose is unconstitutional.

In *Buckley v. Valeo*, 424 U.S. 1, 39-51 (1976), this Court struck down provisions of the Federal Election Campaign Act which imposed $1,000 limits on "independent expenditures" to advocate the election or defeat of "clearly identified candidates" for federal office. This Court rejected arguments that the government had a legitimate interest in equalizing the relative ability of individuals and groups to influence the outcome of elections, and stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." (424 U.S. at 48-49.)

In First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), this Court rejected the argument "that the State may control the volume of expression by the wealthier, more power-

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[12] To the extent that the challenged use tax takes the place of a sales tax on newspapers (A-13), it corresponds to a special tax on the sale of large-circulation daily newspapers, and not to a tax on the sale of all newspapers. *Grosjean* prohibits such a special tax, as a prior Minnesota Attorney General readily recognized. Minn. Atty. Gen. Op., No. 90, at 160, 161 (1948).

ful corporate members of the press in order to 'enhance the relative voices' of smaller and less influential members." *Id.* at 791 n. 30. *Accord, Citizens Against Rent Control v. City of Berkeley*, 50 U.S.L.W. 4071, 4072 (1981); *cf. Larson v. Valente*, 50 U.S.L.W. 4411, 4415-16 (1982).

These constitutional principles would prohibit Minnesota from forbidding a publication from consuming more than $100,000 of paper and ink annually. The challenged use tax admittedly does not go that far, which apparently prompted the Minnesota Supreme Court to distinguish *Buckley* by stating:

> By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount. (A-19.)

However, the constitutional principles espoused in *Buckley* and *First National Bank* go beyond outright prohibition. It is just as unconstitutional for government to *inhibit* the circulation of information by taxation as it is to *prohibit* the circulation outright, as *Grosjean v. American Press Co.* established.

The State suggests that the $100,000 exemption is "not unlike" the limited political contribution tax credit allowed against the federal income tax by 26 U.S.C. § 41. (Motion at 23 n.10, 27.) The State's argument misconstrues the nature of First Amendment protections. Income taxes are not imposed upon expressive activity; they are imposed upon accumulated income. If a taxpayer spends part of that income upon expressive activity, the government need not subsidize that choice through deductions from gross income and may require the taxpayer to pay for those activities entirely out of his own pocket, provided that the denial of any deduction is nondis-

criminatory. *See Cammarano v. United States*, 358 U.S. 498, 513 (1959). Thus, if Star Tribune spends some of its income to purchase paper and ink, the First Amendment does not require the State to allow those expenditures as deductions from its gross income—unless such a denial of deduction would discriminate against a newspaper's ordinary business expenses as compared with other similarly situated taxpayers' deductible business expenses. But this treatment of business expenses is very different from the State imposing an additional financial burden directly upon expressive activity—for example, by creating a separate tax on political contributions or, as here, by directly increasing a newspaper's cost by levying a use tax on the consumption of those two raw materials (paper and ink) which comprise a published newspaper. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo*, 424 U.S. at 49. The challenged use tax creates a burden based upon just such improper financial factors.

It is not surprising that Minnesota's general sales and use tax laws are the setting for a special tax which is borne only by publishers of Minnesota's large newspapers. Sales and use taxes are particularly susceptible to discriminatory adjustment. General revenue-raising measures such as income taxes, real property taxes, and gasoline taxes legitimately can be refined through classifications and exemptions, but do not lend themselves to easy discrimination against particular classes of users, such as newspaper publishers, because such discrimination would require blatant departures from the basic classifications of such taxes. Income may be taxed progressively based upon ability to pay, but no one would suggest that the

State selectively could tax the income of journalists for daily newspapers at a different rate than other taxpayers. The State may choose to apply different property tax rates to residential and industrial property, but it could not hope to tax the real property of newspaper publishers differently than other property. At oral argument before the Minnesota Supreme Court, Justice Peterson posited a gasoline excise tax "made applicable only to publication companies that used in excess of a certain number of gallons of gasoline." (A-30.) The State's counsel conceded, in effect, that such a tax would be patently unconstitutional. (*Id.*)

By contrast to the broad categories utilized in such other taxes, sales and use taxes by their very nature classify and exempt according to narrowly specified categories of uses. The State insists that it "is not constitutionally constrained to exempt all items of property from taxation, or none at all." (Motion at 22.) Minnesota has chosen to exercise this discretion in great detail: It exempts bowling shirts, but not bowling shoes; bathing suits, but not skin-diving suits. 13 Minn. Code of Agency Rules, Tax S & U 407B (1979). It chose to wait more than a decade after its 1971 "search for additional statewide revenue" (Motion at 13) before taxing the sale of candy bars and soft drinks. 1982 Minn. Laws, Ch. 641, Art. 2, § 5 subds. 1(a)(i) & (ii). The Legislature has not restricted its choices to taxation or total exemption from tax, but has established special tax rates. When it raised the general sales tax rate to 5 percent in 1981, "sales of farm machinery" remained subject to the former 4 percent rate. Minn. Stat. §§ 297A.02, 297A.14 (1981 Supp.) By exempting the first $100,000 of paper and ink consumed by newspapers, the State imposed a steeply graduated effective rate of use tax paid by newspapers (*see* A-90-92), while all other taxpayers pay a uniform

rate (of 5, 4, or 0 percent, depending upon type of purchase) on all purchases. Such discriminatory classifications may be acceptable in other contexts, but not when they imperil First Amendment rights. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n.3 (1973); *cf. Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (usual deference to broad legislative discretion in tax cases is not appropriate when tax measure is challenged as undue burden on activity granted special constitutional recognition).

The State defends the challenged use tax as an ordinary tax which is "an integral part of Minnesota's general sales and use tax law." (Motion at 7.) This defense is deceptive. Although the State disavows any authority to raise the rate of tax paid by newspapers above the rate paid by other businesses (Motion at 7 n.4), it asserts the authority to impose a tax directly upon expressive activity and then, *solely as a matter of legislative grace*, to exempt some expressive activity entirely, to exempt other expressive activity in part, or to tax different expressive activities at different rates; and to do so without having to justify its choices in court. (*See* Motion at 21-22.) The potential in such asserted authority for rewarding friends and punishing enemies represents sophisticated censorial control beyond that present in the original Stamp Act.[13] Such taxes are not, and must not be, among the "ordi-

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[13] "[T]he tax of 1712 fell most heavily upon the printers and writers who supported the government and who were therefore more or less compelled to pay the tax. While the Tory party seemed willing to sacrifice the presentation of its own side of political controversies in order to kill off the literature of the opposition, the ministers were somewhat astonished to discover that the loyal journals were suffering under the tax and that the opposition publications were avoiding it." Siebert, *supra* at 317.

nary forms of taxation for support of the government" which *Grosjean* permits to be imposed upon the press, 297 U.S. at 250.

As a result of the $100,000 exemption, Minnesota imposes the heaviest use tax burden upon those newspapers which communicate the most information. As with the expenditure ceilings involved in *Buckley v. Valeo*, the challenged use tax restricts the extent of virtually every means of communicating additional information, whether by increasing the number of pages, copies or issues. "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. at 19. The restriction is unconstitutional whether it takes the form of an absolute ceiling on spending, as in *Buckley*, or of a tax penalty when spending on communication exceeds a certain level, as in the present appeal. It is the fact of the improper burden, and not its magnitude, that is the constitutionally objectionable factor. L. Tribe, *American Constitutional Law*, § 16-8 at 1005 n.18 (1978). The classification itself is improper, and so the tax must fall.

III. The Challenged Use Tax Denies Equal Protection of the Laws by Imposing a Graduated Tax on Business Activity, and Conflicts with *Stewart Dry Goods v. Lewis*.

As the Minnesota Supreme Court acknowledged, the "practical effect of this [$100,000-per-publication] exemption during 1974 and 1975 was to relieve from payment of use tax all but a dozen or so publishers." (A-14.) The challenged use tax establishes two rates of taxation for otherwise identical First

Amendment activities, depending only upon the amount of a publisher's prior consumption of paper and ink. The $100,000 exemption also produces a steeply graduated effective rate of use tax on a publisher's total consumption of paper and ink. Star Tribune, publisher of Minnesota's two largest daily newspapers, paid tax on its total use of paper and ink at the overall rate of 3.95 percent, while the second-largest publisher paid at the rate of 3.85 percent, the two next-largest publishers at about 3.33 percent, and the smallest publisher paying any tax at all paid at an effective overall rate of 0.117 percent—all under an ostensibly flat rate 4 percent tax. (A-90-92.)

This Court has held that the gross sales of a merchant do not bear a constant relation to its net profits, and a graduated sales tax therefore unconstitutionally denies equal protection of the laws. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 558, *reh. denied*, 295 U.S. 768 (1935). Similarly, a merchant's gross expenses—such as a newspaper publisher's purchases of paper and ink—do not bear a constant relation to its net profits. The recent failures of major daily newspapers in such cities as Washington and Philadelphia illustrate the principle that a large-circulation newspaper is not necessarily a profitable newspaper. *See Washington Star Is to Shut Down After 128 Years*, The New York Times, July 24, 1981, at 1, col. 2; *Philadelphia's Bulletin, 1847-1982*, Newsweek, February 8, 1981, at 95, col. 2.

Although in 1939 it had endorsed the reasoning of *Stewart Dry Goods*,[14] the Minnesota Supreme Court rejected it here, stating:

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[14] In *National Tea Co. v. State*, 205 Minn. 443, 286 N.W. 360 (1939), *vacated and remanded*, 309 U.S. 551, *affirmed on remand*, 208 Minn. 607, 294 N.W. 230 (1940).

> Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified . . . as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system. (A-17.)

Such semantic distinctions are squarely contrary to this Court's reasoning in *Stewart Dry Goods*: "In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect." 294 U.S. at 555. Moreover, the Minnesota Supreme Court's purported "distinction" plainly ignores the language of Minnesota's use tax, which is imposed expressly upon "the *privilege* of using, storing or consuming in Minnesota tangible personal property." (A-74; emphasis added.)[15]

Even without the First Amendment considerations arising from the nature of the activity subjected to this peculiar use tax, the non-rational $100,000 exemption imposes a graduated tax on business activity which denies Star Tribune equal protection of the law in violation of the Fourteenth Amendment.

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[15] Other state courts, without necessarily citing *Stewart Dry Goods*, have applied its principles to invalidate graduated sales and use taxes. *See, e.g., Volusia County Kennel Club v. Haggard*, 73 So.2d 884, 898 (Fla. 1954) ("Inequality becomes so apparent and obvious when the rate of taxation is increased based solely on the amount of business done that further discussion of the question is unnecessary."); *Kroger Co. v. Schneider*, 223 N.E.2d 606, 611 (Ohio 1967); *Blauner's Inc. v. City of Philadelphia*, 198 A. 889, 893 (Pa. 1938).

IV. When It Has Chosen Not to Tax the Sale of Newspapers, Minnesota Cannot Impose a "Compensating" Use Tax Upon Paper and Ink If a Sales Tax Upon Newspapers Would Abridge Freedom of the Press, Nor Can It Impose a Unique Use Tax on Paper and Ink When the Discriminatory Tax Treatment Is Not Necessary to Accomplish a Compelling State Interest.

The Minnesota Supreme Court acknowledged that the challenged statute taxes newspaper publishers in a different manner than other industrial users of paper and ink (A-8), but upheld the statute because publishers paid a use tax while other industrial users' goods were subject to a sales tax. (A-12-13.) Implicit in the Minnesota Supreme Court's approach to the present issues on appeal are two assumptions which were largely unexpressed in the opinion itself, and consequently received little or no analysis or explanation.

First, the court apparently assumed that a tax on the sale of newspapers would be constitutional. *Second,* it apparently assumed that, if the Legislature chose to exempt newspapers from the sales tax as it did here, (i) it could substitute a use tax or any other tax so long as the overall tax burden on newspaper publishers was equivalent, and (ii) the use tax burden in fact is no different than the sales tax burden. Both assumptions are wrong.

A. A Tax Upon the Sale of Newspapers Would Abridge Freedom of the Press.

The Minnesota Supreme Court disclaimed any ruling on the constitutionality of a sales tax on newspapers. (A-13, n.10.) Nevertheless, it found the challenged use tax to be constitutional and distinguished it from the license tax at issue in

Grosjean on the grounds that "sales and use taxes are now commonplace and readily accepted" and have "no 'long history of hostile misuse against the freedom of the press.'" (A-12.) Thus, the Minnesota Supreme Court clearly proceeded from an assumption that a tax upon the sale of newspapers would be constitutional.

If this Court chooses to address this broader issue, Star Tribune submits that a tax imposed directly on the sale of newspapers would violate the First Amendment.[16] The sale of newspapers or other information is an activity protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4764 (1981); *Smith v. California*, 361 U.S. 147, 150 (1959). By imposing a tax upon the sale of newspapers the State would create a direct financial obstacle to the very act of dissemination of information; if buyers cannot or will not pay the additional amount necessary to satisfy the sales tax, the transfer of information may not occur, or may occur less often.

Although this Court has never given plenary consideration to the constitutionality of a tax on the sale of newspapers, it has invalidated state-created financial obstacles to communication in the form of license taxes. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (city could not require distributor of religious literature to obtain occupational license); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (city could not require occupational license for Jehovah's witness who distributed

[16] Even the State's counsel concedes that Minnesota's current statutory exemption of newspapers from sales tax is supported, if not compelled, by constitutional principles. (A-34-35.) The exemption is part of a large body of legislation intended to enhance the First Amendment values of uninhibited, robust and wide-open public debate. The courts look with favor upon such legislation. *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976); *cf. Walz v. Tax Commission*, 397 U.S. 664 (1970).

religious literature door-to-door and solicited purchases of books and pamphlets); *Jones v. City of Opelika*, 319 U.S. 103 (1943), *reversing and adopting dissenting opinions*, 316 U.S. 584 (1942) (invalidating annual occupational license to sell religious books). This Court's citations of *Grosjean* in *Follett*, 321 U.S. at 577, and in *Murdock*, 319 U.S. at 114-115, suggest that this Court viewed the early "taxes on knowledge" as direct taxes on the exercise of a First Amendment right. The stamp tax on the circulation of newspapers was the equivalent of a sales tax in all of its essential features. The English Stamp Tax differed from a modern-day tax on the sale of newspapers only in its exorbitant amount and in its failure to be fixed as a percentage of the sales price.[17] The stamp was simply the chosen method of collecting the tax in advance. *See generally* sources cited at p. 18 above.

The Minnesota Supreme Court chose to interpret *Follett*, *Murdock* and *Jones* narrowly, and relied instead on *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958). (A-14.) *Steinbeck* involved a "privilege tax" imposed on gross receipts received from trades, professions or commercial activities, including the profession of author. As with the taxes measured by gross business receipts involved in *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), and *Giragi v. Moore*, 64 P.2d 819 (Ariz.), *appeal dismissed*, 301 U.S. 670 (1937), the *Steinbeck* tax fell upon the accumulation of income by all businesses.[18] In each case, the lower courts

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[17] The same differences existed between the English tax on advertisements and the Louisiana license tax which this Court invalidated in *Grosjean*, but those differences did not receive even passing mention in the *Grosjean* opinion.

[18] Although the dismissal of the appeal in *Steinbeck* has some precedential value, it is not of the same precedential value as would

looked at the impact of the tax upon annual revenues rather than upon individual transfers of information; in each case, the tax itself was based upon gross receipts of the seller, who also paid the tax, rather than upon the individual sale in which the buyer would be required to pay the tax as a condition of the transfer of property.[19]

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be an opinion of this Court treating the question on the merits, particularly where constitutional questions are involved, as they are involved here. *Tully v. Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari v. Steinberg*, 419 U.S. 379, 392 (1974) (Burger, C.J., concurring). Summary dispositions affirm the judgment but not necessarily the reasoning of the lower court, *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979), and extend only to "the precise issues presented and necessarily decided," *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). "[N]o more may be read into [this Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

[19] The Arizona annual privilege tax at issue in *Giragi* was tied to "the gross proceeds of sales or gross income from the business," 58 P.2d at 1249 (prior opinion). The Arizona Supreme Court commented in upholding the tax: "[A]ll who share the protection given by the government should also share the expense of that protection *in proportion to their ability*, regardless of the business they are engaged in, if it is for profit." 64 P.2d at 822 (emphasis added). Likewise, the city taxes in *Tampa Times* and *Steinbeck* were viewed as the functional equivalents of income taxes. *Tampa Times Co. v. City of Tampa*, 29 So.2d at 370 ("Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press any more than an income or ad valorem tax will destroy freedom of speech to any other citizen . . . . A state may choose to substitute a gross sales tax but in that case the relative burden on a newspaper would not be changed."); *Steinbeck v. Gerosa*, 151 N.E.2d at 177 (The city gross receipts tax "is, like any tax, a burden. Nevertheless, it does not impair Mr. Steinbeck's right of freedom of the press any more than an income tax impairs such right.").

The Minnesota sales and use tax system does not lend itself to such benign interpretations. It is not an income tax; Minnesota separately taxes net corporate and personal income. Minn. Stat. §§ 290.02, 290.03 (1980). The sales tax is tied to the sales price of the article sold and not to the gross revenues of the seller, and the State *prohibits* the seller from absorbing the amount of tax. Minn. Stat. § 297A.03. Thus, extending Minnesota's sales tax to newspapers would interpose a tax at the very focal point of the constitutionally protected activity: the transfer of information.[20] A Minnesota publisher could then

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[20] The State does tax the sale of books and other printed communications published less than four times per year. (JA-31.) Both the State (Motion at 21 n.9) and the Minnesota Supreme Court (A-13 n.10) seemed taken with the notion that books, which are clearly protected by the First Amendment, are subject to retail sales tax in Minnesota, without any known court challenge to the constitutionality of such a tax.

The sale of books, as well as the sale of newspapers and magazines, is constitutionally protected activity. This Court recognized as much in *Smith v. California*, 361 U.S. 147, 150 (1959) and in *Burstyn v. Wilson*, 343 U.S. 445, 501-02 (1952), each of which cited *Grosjean* for the proposition that a profit motive or "commercial auspices" of the sale will not take the activity outside the scope of the First Amendment. Ironically, books largely escaped the original English taxes on knowledge; the principal objective of the government was the suppression of small, cheap publications which were circulated among the poorer classes, and books were sufficiently expensive to be enjoyed primarily by the wealthier, progovernment classes. 2 May, *supra* at 172; Siebert, *supra* at 311. However, the tax on paper affected, and was opposed by, publishers of books as well as publishers of newspapers. 2 May, *supra* at 215; 2 Collet, *supra* at 86.

The apparent absence of court challenges to taxes on the sale of books probably says more about the distribution of the burden of such taxes than about their constitutionality. Publishers of books as a general rule neither pay nor collect the sales tax. Retailers collect but do not pay the sales tax. Customers do pay the tax on each purchase, and this payment does affect the exercise

no more lawfully sell a newspaper to a reader without collecting the tax than he could lawfully have sold an unstamped newspaper in England at the time the First Amendment was adopted.

The very number and variety of taxes attest to the fact that each tax has a different impact. In *Follett, Murdock, Jones* and *Grosjean*, this Court carefully distinguished between a tax on income derived from constitutionally protected activity and a tax on the protected activity itself. The net income of a publisher or a minister are not inherently different from the net income of a shoe salesman or an automobile manufacturer; the State can and does tax all such income, subject to the same generally applicable rules, and Star Tribune pays such taxes without constitutional objections. (JA-12.) In contrast, sales and use taxes are imposed upon the transfer of goods or services from one person to another (A-72, 73) or upon "the privilege of using, storing or consuming" property (A-74). These are taxes upon specified activity itself: the sale of newspapers, shoes or automobiles.[21]

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of constitutional rights, because the First Amendment protects the right to receive information as well as the right to transmit information. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). However, the taxes on an individual's purchases are not likely to amount to enough to induce him to seek judicial vindication of his rights. This Court has shown its sensitivity to such pragmatic considerations in prior First Amendment cases. *See, e.g., Bantam Books v. Sullivan*, 372 U.S. 58, 64 & n.6 (1963).

[21] If the State may impose a direct tax upon activity, it need not limit the tax to activity with commercial aspects. Indeed, Minnesota for years taxed transfers of property by gift at substantially higher rates than it taxed transfers for consideration. *See* Minn. Stat. § 292 *et seq.* (1978), *repealed* 1979 Minn. Laws, Ch. 303, Art. 3, § 41. Gifts not in excess of $3,000 in value to any one person

To the extent that sales taxes fall directly upon expressive activity, they encroach upon First Amendment freedoms. The State may not justify this direct burden on constitutionally protected expressive activity simply by contending that it imposes an equivalent burden on unprotected mercantile activity. As this Court said in condemning the license tax at issue in *Murdock v. Pennsylvania*, 319 U.S. at 115:

> A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

See also, Jones v. City of Opelika, 316 U.S. at 620 ("The exercise, without commercial motives, of freedom of speech, freedom of press, or freedom of worship are not proper sources of taxation for general revenue purposes.").

The "without commercial motives" *caveat* of the above quotation from *Jones* has no bearing on the present case. The ultimate majority in *Jones* found it "unnecessary to consider now the validity of such taxes [license taxes for revenue purposes] on commercial enterprises engaged in the dissemination of ideas." 316 U.S. at 619. To the extent that *Jones, Murdock* and other past decisions of the Court "hold or indicate that commercial speech is excluded from First Amendment

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by any donor during any calendar year were exempted from tax. Minn. Stat. § 292.04(6) (1978). This exemption prevented the gift tax from creating any substantial problem for expressive activity such as the distribution of handbills, free newspapers and the like. It is worth noting that this exemption, unlike the $100,000-per-publication exemption of the challenged use tax, applied to all gifts, not just gifts of particular items.

protections, those decisions, to that extent, are no longer good law." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n.7 (1980). The fact that Star Tribune sells its newspapers to earn a profit, among other reasons, does not justify interference with its First Amendment rights. "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Burstyn v. Wilson*, 343 U.S. 495, 501-02 (1952). The "commercial motives" connected with some expressive activity are suitably and adequately taxed by personal and corporate income taxes, which are levied upon the profit derived from the activity and not upon the activity itself. *See* Note, *Use of Taxation and Licensing in the Suppression of Freedom of Religion and the Press*, 52 Yale L.J. 168, 172-73 (1942).

If the First Amendment prohibits a State from enacting legislation which imposes a tax on the sale of newspapers, it follows that a State cannot reach the same result indirectly through the simple expedient of first enacting and then deleting a statutory exemption from the sales tax. The ability to strip the press of an existing statutory immunity from taxation, at any time and for any reason, raises the same specter of censorial abuse as does the ability to levy a special tax upon newspapers. *Speiser v. Randall*, 357 U.S. 513 (1958). Nor can Minnesota circumvent the constitutional invalidity of a sales tax on newspapers by imposing a special "compensating" use tax to which no other similarly situated taxpayer is subject. *See Phillips Chemical Co. v. Dumas Ind. School Dist.*, 361 U.S. 376, 382-83 (1960); *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

B. Even If a Tax Upon the Sale of Newspapers Would Be Constitutional, Minnesota's "Compensating" Use Tax Upon Paper and Ink Must Be Invalidated Because Its Discriminatory Classifications Are Not Necessary to Accomplish a Compelling State Interest.

Minnesota specifically exempts publications from its sales tax, but it imposes a use tax on paper and ink, and further carves out a $100,000-per-publication exemption from the use tax; as a result, it discriminates between publishers and other industrial users of paper and ink, between foreign and domestic publishers, between large and small publishers, and between newspapers and other entities which are exempted from the sales tax. The burden of the challenged use tax is not equivalent to that of the general sales tax. Rather, it is a special tax abridging freedom of the press. Contrary to the suggestion of the Minnesota Supreme Court, the challenged use tax does not fit neatly into "a general system of sales and use taxation to which most goods (other than food, clothing and medicine) are subject in Minnesota." (A-12.) It has unique features which distinguish and separate it from the general system of Minnesota sales and use taxes, with resulting discrimination against large Minnesota newspaper publishers. That discrimination is not necessary to serve any compelling state purpose.[22]

First, no other general or special provision of Minnesota's sales and use tax laws provides a significant exemption based

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[22] On the present record, any attempt to identify the State's purposes for the discriminatory classifications of the challenged use tax necessarily involves speculation. There is no official legislative history, apart from the changes in the statutory language itself, to document the legislative purpose of the challenged use tax. In Appellant's Informal Brief before the Minnesota Supreme Court at page 17, the State concedes: "The lack of any extant legislative history regarding the $100,000 exclusion makes it impossible to know precisely what purposes the legislature had in mind when

upon the dollar amount of purchase.[23] The $100,000 exemption thus creates a distinction not only within the class consisting of all newspapers, but also between newspaper publishers and all other taxpayers.

The State suggests that because the $100,000 exemption applies to all publications, it is nondiscriminatory, "because the

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it adopted the provision in 1973." The same vacuum exists with respect to the 1971 legislation.

The absence of legislative history is the State's own responsibility. The Minnesota Legislature is well aware of how to make clear the objectives of its legislation, particularly when it anticipates litigation. *See Contos v. Herbst*, 278 N.W.2d 732, 734-35, 738 (Minn.), *appeal dismissed* 444 U.S. 804 (1979). It is also well aware of how to obscure its objectives. For example, both the Minnesota Senate and House of Representatives, by rule, provide for the recording of certain legislative proceedings and the preservation of the tape recordings in the Minnesota State Legislative Reference Library; however, those same rules expressly provide that the discussions on the tapes are not to be admissible in any court or administrative proceeding on the issue of legislative intent. *See* Rule 1.18 of the Rules of the Minnesota House of Representatives (". . . Discussion preserved under this rule is not intended to be admissible in any court or administrative proceeding on an issue of legislative intent."); Rule 65 of the Permanent Rules of the Senate (". . . It is the intention that testimony and discussion preserved under this rule not be admissible in any court or administrative proceeding on an issue of legislative intent.").

When legislation is subject to strict and exacting scrutiny, as is the challenged use tax here (see pp. 14-17 above), proffered explanations of legislative purpose based on speculation and unsupported by evidence in the legislative record will not suffice. This Court does not accept mere recitations of benign purposes for legislation which impairs fundamental rights or involves suspect classifications, when those explanations are supplied only by hindsight or as an afterthought. *See, e.g., Mississippi University for Women v. Hogan*, 50 U.S.L.W. 5068, 5071 (1982); *Califano v. Goldfarb*, 430 U.S. 199, 212-13 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975); *Eisenstadt v. Baird*, 405 U.S. 438, 447-55 (1972).

[23] The only other provisions of Minnesota's sales and use tax laws, Minn. Stat. Ch. 297A, providing any exemption whatsoever based upon the amount of purchase are those disregarding sales where the tax would be less than one half of one cent. *See* Minn. Stat. §§ 297A.03 subd. 2 (A-73-74), 297A.18.

Fourteenth Amendment guarantees only equal laws, not necessarily equal results." (Motion at 23.) For the State's suggestion to be accurate, however (even if fundamental constitutional rights were not at issue, as they are here), the $100,000 exemption would have to be at least rational. "*When the basic classification is rationally based,* uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (emphasis added). The problem with the State's position is that the $100,000 exemption is not even rational, much less necessary to achieve a legitimate compelling state interest.

The bracket system for calculating sales and use taxes[24] approved in *Mouledoux v. Maestri*, 2 So.2d 11 (La. 1941) (cited as principal authority by the State in its Motion at 23) easily met the requirement of rationality:

> [C]omplete equality could be secured only by the coinage of tax tokens or the issue of stamps in denominations of one-fifth mill. Every purchase involving an odd number of cents would require a unit that small to compute the tax accurately at 2 per cent. Such a solution, it seems to us, would be both oppressive and unnecessary.

Id. at 21. Similar justifications based upon administrative convenience support the general "rounding" provision of Minn. Stat. § 297A.03 subd. 2 (A-73-74) as well as the fee categories in *Tampa Times Co. v. City of Tampa*, 29 So.2d 368, *appeal*

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[24] The bracket system provided that on transactions from 1 cent to 12 cents inclusive, there was no tax, on transactions from 13 cents to 62 cents inclusive, the tax was 1 cent, on transactions from 63 cents to 99 cents inclusive, the tax was 2 cents, and on each transaction of $1 even, the tax was 2 cents plus the foregoing rates on the amount in excess of the even dollar. *Mouledoux v. Maestri*, 2 So.2d 11, 21 (La. 1941).

dismissed, 332 U.S. 749 (1974): not only are the categories uniform, but the variations in tax amounts involved are *de minimis*.

No such rationale explains the present $100,000 exemption. At a 4 percent tax rate, the $100,000 exemption confers a $4,000 tax benefit on each publication. The State actually collected less than this amount in paper and ink use taxes from five of the 11 taxpaying publishers in 1974 and from seven of the 13 taxpaying publishers in 1975, collecting as little as $120 in 1974 from the *Fergus Falls Daily Journal*. (A-5-7, nn. 4 & 5.) This is far from *de minimis* impact. The $100,000 exemption category is so arbitrary and non-rational that it would violate the equal protection provisions of the Fourteenth Amendment even if it did not also impair First Amendment rights. See pp. 31-33 above. Furthermore, mere administrative convenience (if even that exists here) is not a compelling state interest which will justify a classification which affects fundamental constitutional rights, including freedom of the press. *Carey v. Population Services International*, 431 U.S. 678, 691 (1977); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

Because of its size, the $100,000 exemption works contrary to the purported revenue-raising objective of the tax. The total taxes *collected* under this use tax on paper and ink during the years at issue were only about one-half of the potential revenue tax *loss* caused by the $100,000 exemption.[25] Even limiting consideration of the effect of the $100,000 exemption to those newspapers which actually paid some tax, the revenue

[25] At a use tax rate of 4 percent and an exemption of $100,000 per publication, the revenue loss is $4,000 per publication. With approximately 400 Minnesota newspapers, the potential annual revenue loss is 400 times $4,000, or $1.6 million. Because not all newspapers consume $100,000 of paper and ink products, the actual revenue loss each year is somewhat less. Total revenues collected were $893,355 in 1974 and $944,055 in 1975. (A-5-6, nn. 4 and 5.)

loss from the exemption in 1974 and in 1975 nearly equalled the total taxes paid by all newspapers except the daily newspapers in Minneapolis and St. Paul.[26] If the $100,000 exemption were extended to all taxable items, the State would have lost 40 to 44 percent of all the sales and use tax revenues which it collected in the 1973-1975 period. (*See* Star Tribune's Memorandum in Support of Motion for Summary Judgment, Appendices B, C, D, and F.)

Second, the challenged use tax on paper and ink distorts the function of a compensating use tax. All States that impose sales taxes also impose a corollary, compensating use tax on property purchased outside the State; the tax is intended to protect both local merchants and the local treasury by taxing the intrastate use of property which would have been subject to the sales tax had it been purchased within the State. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977); Note, *Economic Neutrality and the Compensating Use Tax*, 16 Stan. L.Rev. 1016, 1016 (1964).

In contrast, the challenged use tax on paper and ink is not a compensating tax because it does not reach out-of-state transactions at all. Only Minnesota newspaper publishers pay the use tax, notwithstanding the fact that all newspapers sold in Minnesota are exempt from the sales tax, regardless of where they are published. (A-87.) If Minnesota attempted to

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[26] In 1974, Minnesota collected $82,473 from all newspapers except the daily newspapers in Minneapolis and St. Paul. (A-5, n.4.) That year, 14 newspapers (published by 11 publishers) reached the $100,000 threshold and paid some tax. At $4,000 per newspaper, the $100,000 exemption cost Minnesota $56,000 in lost revenues that year from the taxpaying publishers alone. Similarly, in 1975, Minnesota collected $90,302 from all newspapers except the daily newspapers in Minneapolis and St. Paul, (A-6, n.5) while revenues lost from the 16 newspapers exempted that year were $64,000. These figures do not include the potential revenues actually lost from other newspapers which failed to reach the $100,000 threshold and consequently paid no tax whatsoever.

impose greater taxes on foreign than domestic businesses, it would violate Commerce Clause principles articulated by this Court since at least *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). Similarly, Minnesota's decision to single out domestic newspaper publishers for a discriminatory use tax violates the First Amendment's guarantee of a free press. *Cf. Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 & n.3 (1973) (peril to specific federal right, whether based on First Amendment or interstate commerce, restricts leeway ordinarily granted to States in making classifications for tax systems). The fact that Minnesota's domestic newspaper publishers (which are subject to the challenged use tax) are more likely to criticize the State government on a regular basis than are foreign newspaper publishers (which are exempt from Minnesota's sales and use taxes) suggests one motive for the State's discriminatory tax treatment.

Third, Minnesota purports to have adopted a unified scheme of sales and use taxation which taxes only final products, and not component parts. *See Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W.2d 234, 239 (Minn. 1979). In contrast, the challenged use tax on paper and ink is not imposed when the final product (newspapers) is purchased at retail by the ultimate user (a reader), but instead is imposed upon the consumption of a newspaper's essential component parts (paper and ink) during the publication process. A sales tax is imposed only when and if a sale actually occurs, but the newspaper publisher (once over the $100,000 annual threshold) pays the use tax on paper and ink consumed in publishing every copy of each issue, without regard to the sales price or to whether a copy is spoiled in printing, cannot be sold or is given away. Approximately 86 to 92 percent of the newsprint consumed by Star Tribune becomes newspapers actually distributed to readers. The remaining 8 to 14 percent rep-

resents waste. (JA-12.) Thus, the challenged use tax is broader than a sales tax, because it taxes items which are not ultimately sold at retail.

The newspaper publisher pays the use tax directly to the State, whereas the publisher would act merely as a collection agent of a sales tax. The Minnesota Supreme Court rejected Star Tribune's argument based upon this factor as being "without merit," because "producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices." (A-14.) That assumption ignores the practicalities of newspaper pricing: single-issue prices of newspapers invariably increase by multiples of five cents, but the use tax burden on a single issue could be one or two pennies. This makes it extremely cumbersome for a publisher to "pass on" the use tax burden.

To the extent that a newspaper's final price does include the use tax burden, the tax is nearly invisible to the consumer because it is not calculated separately at the time of sale (as is a sales tax), and therefore is less likely to provoke public sentiment for repeal of the tax. (*Cf.* A-34-35.)

In several important ways, therefore, the burden which the challenged use tax imposes upon publishers of large Minnesota newspapers is significantly greater than that which would be imposed by the hypothetical tax on the sale of newspapers.

Fourth, imposing the challenged use tax upon component parts rather than upon a finished product produces other discriminatory treatment between newspaper publishers and other industrial users. The "industrial use" exemption applies to all materials used or consumed in agricultural or industrial production of personal property "intended to be sold ultimately at retail," but does not require that the ultimate sale at retail itself be subject to tax. The industrial user of paper and ink pays no tax on his consumption of those raw materials, regardless of whether his final product is a taxable roll of

wrapping paper, a tax-exempt milk carton (A-84, Minn. Stat. § 297A.25 subd. 1 (a)), or a tax-exempt school textbook (A-90, Minn. Stat. § 297A.25 subd. 1(v)). Of all instances in which the sale of a final product is tax-exempt, only newspaper publishers are subjected to a "compensating" use tax on consumption of materials used to make that final product.

The Minnesota Supreme Court did not determine whether any of this discriminatory treatment of large Minnesota newspaper publishers is necessary to the State's generalized need to raise revenue. Its sole suggested reason for subjecting newspapers to a use tax rather than a sales tax was "the difficulties and expense of collecting sales tax upon sales of such low-priced items." (A-13.) That rationale is contradicted by the State's practice. The State taxes the sales of many low-priced items as diverse as pipe cleaners, picture hangers, toothpicks, paper clips and six-inch plastic rulers and it presently exempts only sales at prices of nine cents or less. Minn. Stat. § 297A.03 subd. 2 (1981).

A State constitutionally may not tax newspaper publishers on a different basis, and at a different rate, than it taxes other persons, simply by placing the publishers' tax within a broad taxing statute and then proffering the general need to raise revenue as the shield to judicial scrutiny. As discussed above, Minnesota's sales and use taxes discriminate between publishers of large and small newspapers, between domestic and foreign publishers, between publishers and other industrial users of paper and ink (and other raw materials), and between publishers and other entities (and between newspapers and other products) which enjoy a statutory exemption from the sales tax—all to the disadvantage of publishers of large Minnesota newspapers. None of this discriminatory tax treatment has been shown, or could be shown, to be necessary to accomplish any compelling state interest.

CONCLUSION

This is not a case in which the press requests new and special privileges. Instead, Star Tribune simply seeks the protections which the Framers of the Bill of Rights fought to incorporate within the First Amendment, and which this Court unanimously reaffirmed in *Grosjean v. American Press Co.*

The decision of the Minnesota Supreme Court undermines fundamental constitutional principles. The challenged use tax directly burdens expressive activity and blatantly discriminates against and among newspaper publishers. The First and Fourteenth Amendments do not countenance such a tax.

The January 5, 1982, judgment of the Minnesota Supreme Court should be reversed.

Respectfully submitted,

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